Chen Chong Fat & Ors v Chua Thian Teng & Anor

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22–70 OF 1987
ARIFIN ZAKARIA J
19 OCTOBER 2000

Civil Procedure *— Arbitration — Reference to arbitration — Applicant did not state in affidavit supporting application that he is willing and ready to do all things necessary for proper conduct of arbitration — Whether action should be stayed and dispute referred to arbitration — Arbitration Act 1952 s 6*

Civil Procedure *— Writ of summons — Renewal — Failure to endorse renewal on writ — Whether writ valid — Rules of the High Court 1980 O 6 r 7(3) & O 2 r 1(2)*

The plaintiff's writ was renewed on three ocassions between 1988 to 1991, and was served upon the first defendant by way of substituted service sometime in 1991. On 14 September 1992, the statement of claim was amended and it, together with the writ, was served upon the first defendant on 13 April 1999. The first defendant contended that the writ was invalid as it had not been renewed when it was served. The plaintiff argued that the writ need not be renewed since it had already been served upon the first defendant by way of substituted service, to which the first defendant argued that the substituted service did not comply with O 6 r 7(3) of the Rules of the High Court 1980 ('the RHC') for failure to endorse the renewal on the writ. The first defendant's application, supported by an affidavit, to set aside the amended statement of claim and writ, and for all proceedings to be stayed for the dispute to be referred to arbitration was dismissed by the senior assistant registrar. The first defendant appealed.

Held, dismissing the appeal:

(1) The purpose of the endorsement is merely to give notice to the defendant that the writ had been duly renewed. Failure to give such notice should not render an otherwise perfectly valid writ invalid, or the service of it be declared invalid. The omission of the plaintiff to endorse one of the notices of renewal on the writ as required by O 6 r 7(3) of the RHC is an irregularity which is curable under O 2 r 1(2) of the RHC (see p 37A, G).

(2) In an application for reference to arbitration, s 6 of the Arbitration Act 1952 requires the applicant to state in its affidavit supporting the application that he is ready and willing to do all things necessary for the proper conduct of arbitration. This the first defendant had failed to do. Such failure was fatal to the first defendant's application (see p 39A–B); *AR Fernandez & Ors v National Union of Bank Employees* [1986] 2 MLJ 135 followed.

[Bahasa Malaysia summary

Writ plaintif telah diperbaharui tiga kali di antara tahun 1988 dan 1991, dan telah disampaikan kepada defendan pertama melalui penyampaian ganti pada tahun 1991. Pada 14 September 1992, pernyataan tuntutan telah diubah dan, bersama dengan writ tersebut, disampaikan kepada defendan pertama pada 13 April 1999. Defendan pertama mengatakan bahawa writ tersebut tidak sah kerana ia tidak diperbaharui apabila ia disampaikan. Plaintif berhujah bahawa writ tersebut tidak perlu diperbaharui kerana ia telahpun disampaikan kepada defendan pertama melalui penyampaian ganti, di mana defendan pertama berhujah bahawa penyampaian ganti tersebut tidak menurut A 6 k 7(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana ia gagal mengindors pembaharuan writ tersebut. Permohonan defendan pertama, disokong oleh satu afidavit, untuk membatalkan pernyataan tuntutan yang diubah dan writ tersebut, dan untuk menangguhkan semua prosiding supaya pertikaian tersebut dapat ditimbangtara telah ditolak oleh penolong kanan pendaftar. Defendan pertama merayu.

Diputuskan, menolak rayuan tersebut:

(1) Tujuan pengindorsan tersebut hanyalah untuk memberitahu defendan bahawa writ tersebut telah diperbaharui. Kegagalan memberi notis tidak akan menjadikan writ yang sebelum ini sah dan sempurna kini tidak sah, atau penyampaiannya dianggap tidak sah. Kegagalan plaintif mengindors salah satu daripada notis pembaharuan pada writ tersebut seperti yang diwajibkan di bawah A 6 k 7(3) KMT ialah satu salah aturan yang boleh diperbaiki di bawah O 2 r 1(2) KMT (lihat ms 37A, G).

(2) Dalam satu permohonan untuk timbangtara, s 6 Akta Timbangtara 1952 mewajibkan pemohon menyatakan dalam afidavit menyokong permohonan itu bahawa pemohon sedia dan sanggup melakukan semua yang perlu dibuat bagi melancarkan timbangtara dengan sempurna. Defendan pertama gagal melakukan ini. Kegagalannya ini menjejaskan permohonan defendan pertama (lihat ms 39A–B); *AR Fernandez & Ors v National Union of Bank Employees* [1986] 2 MLJ 135 diikut.]

Notes

For cases on renewal of writ of summons, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 5050–5062.

Cases referred to

Arab Malaysian Credit Bhd v Tan Seong Meng [1995] 1 MLJ 525 (refd)
AR Fernandez & Ors v National Union of Bank Employee [1986] 2 MLJ 135 (folld)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)

A *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459 (folld)
Lim Yoon Loy & Ors v Lee Lan [1990] 2 MLJ 425 (refd)
Malayan Banking Bhd & Anor v Swasta Java Sdn Bhd [1990] 2 MLJ 12 (refd)

B **Legislation referred to**

Arbitration Act 1950 s 6
Rules of the High Court 1980 O 2 r 1(2), O 3 r 5, O 6 r 7(2), (3), O 12 r 7

C *C Megalai* (*Meg Nacha & Co*) for the plaintiff/respondent.
Gregory Dicom (*YS Woo & Proctor*) for the defendant/appellant.

Arifin Zakaria J. : This is an appeal against the decision of the learned senior assistant registrar in rejecting the first defendant's application dated 2 May 1999 (encl 78) for the following orders:

D (1) that the service of the plaintiff's writ dated 28 November 1987 and the amended statement of claim on the first defendant be set aside pursuant to O 12 r 7 of the Rules of the High Court 1980; and

(2) that all proceedings herein be stayed pursuant to s 6 of the Arbitration Act 1950;

E (3) costs be paid by the plaintiffs; and

(4) further or other reliefs as this honourable court deems fit and proper.

The application is supported by the affidavit of the first defendant affirmed on 30 April 1999 (encl 79). The grounds in support of this application appear in paras 12, 13 and 14 of the said affidavit which read as
F follows:

(12) The plaintiff has failed to renew the writ from 28 November 1991 up to date of service on my solicitors ie 13 April 1999.

(13) Hence I am advised by my solicitors that the service of the writ should be set aside as the writ had expired on 28 November 1991.

G (14) Further and in the alternative, I pray that these proceedings be stayed as the agreement between the plaintiff and myself dated 26 December 1979 has an arbitration clause at cl 16 thereof. A copy of the agreement dated 26 December 1979 is now shown to me and marked as exh 'C-5'.

Essentially the first defendant is alleging that when the writ was served on his solicitors on 13 April 1999 the writ had long since expired and secondly
H these proceedings ought to be stayed for the dispute to be referred to arbitration pursuant to cl 16 of the agreement between the plaintiff and the defendant dated 26 December 1979 ('the agreement').

Validity of the writ

I It is not in dispute that since its issuance the writ was renewed on three occasions between 1988 to 1991 and the writ was served on the first defendant by substituted service sometime in 1991.

The statement of claim was subsequently amended pursuant to a court order dated 14 September 1992. The writ and the amended statement of claim was then served on the first defendant's solicitors on the 13 April 1999. The counsel for the first defendant contended that the writ which was served on the first defendant's solicitors on 13 April 1999 is invalid on the ground that there was no renewal of the said writ between 28 November 1991 to the date of service of the said writ on the first defendant's solicitors. Cik C Megalai for the plaintiff argued that the writ need not be renewed subsequent to 28 November 1991 since the writ had already been served on the first defendant by way of substituted service pursuant to a court order dated 23 December 1990. Therefore when the writ was served on the first defendant's solicitors together with the amended statement of claim on the 13 April 1999 it was a valid writ. She contended that a writ once served on the defendant need not be renewed any longer. The contention of the counsel for the plaintiff seems to find support in the provisions of O 6 r 7(2) of the Rules of the High Court 1980 ('the RHC') which reads as follows:

> … *where a writ has not been served on a defendant* the court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the court before that day or such later day (if any) as the court may allow. (Emphasis added.)

Faced with that arguement, counsel for the first defendant then sought to challenge the writ on the ground that when it was served on the first defendant by substituted service it did not comply with O 6 r 7(3) of the RHC which states that:

> Before a writ, the validity of which has been extended under this rule, is served, it must be marked with an official stamp in Form 5 showing the period for which the validity of the writ has been so extended.

He contended that the writ that was served on the first defendant only bears two endorsements in form 5. Counsel for the plaintiff conceded that there are only two endorsements on the writ for periods 28 November 1988 to 27 November 1989 and 28 November 1990 to 27 November 1991. Thus, there is no endorsement for the period 28 November 1989 to 27 November 1990. However, the plaintiff's counsel informed the court the writ was in fact renewed for the said period but some how it was not endorsed as required by 0 6 r 7(3) of the RHC. She then went on to submit that the said omission is not fatal as to render the writ to be declared invalid. Upon perusal of the court's file, I find there was indeed an application made by the plaintiff for renewal of the writ vide encl 20, and an order in terms of the application was granted by the learned SAR on 7 January 1990. However, this order for renewal has not been endorsed on the writ as required by O 6 r 7(3) of the RHC. The learned counsel for the plaintiff argued that the omission here is a mere irregularity and urged upon the court to use its discretion to have it cured under O 2 r 1(2) of the RHC.

In this case, I don't think it could be denied that the writ was in fact renewed by order of court. The only defect in the writ was the omission to

have the writ endorsed as required by O 6 r 7(3) of the RHC. In this regard I think we ought to consider the purpose of the endorsement. To me, it is merely to give notice to the defendant that the writ had been duly renewed. The failure to give such a notice should logically not render, an otherwise perfectly valid writ, invalid or the service of it be declared invalid. More so in this case where the writ does carry the endorsement for the period 28 November 1990 to 27 November 1991 during which the writ was served on the first defendant, albeit by substituted service. In any event a search in the court file by the first defendant would certainly reveal that the writ had in fact been renewed on three occasions until it was eventually served on the first defendant. In *Lim Yoon Loy & Ors v Lee Lan* [1990] 2 MLJ 425 where the notice of appeal was not served on the respondent although it was attached to the motion by which the appellants applied for stay and this was served on the respondent's solicitors, there the court held that the failure to serve is an irregularity and the court had the unfettered discretion under O 3 r 5 to RHC to extend the time. See also *Malayan Banking Bhd & Anor v Swasta Java Sdn Bhd* [1990] 2 MLJ 12, where judgment was entered in default of appearance but in actual fact appearance had been entered but not registered by the registry in the cause book was held to be a mere irregularity. In considering this issue I take guidance from what was said by Mohd Azmi FCJ in the case of *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 at p 575:

> … the discretion available to this court to cure irregularities under O 2 r 1(1) of the RHC read together with s 69(4) of the Courts of Judicature Act 1964 as well as s 101 of the same Act which allows this court to discount 'any error, defect or irregularity whether in the decision or otherwise, not affecting the merits or the jurisdiction of the court', should only be undertaken by the court in the absence of prejudice.

Turning to the present case, I do not see how this irregularity in the writ could be said to have prejudiced the defendant. The defendant could easily have made the necessary search in the court's file to see if the writ had in fact been renewed. It should always be remembered that a rule of court should not be construed as to produce unfairness or a manifest injustice. (See *Arab Malaysian Credit Bhd v Tan Seong Meng* [1995] 1 MLJ 525). For the above reasons I hold that the omission to endorse one of the notice of renewal on the writ as required by O 6 r 7(3) of the RHC is an irregularity which is curable under O 2 r l(2) of the RHC. I therefore, dismiss the second defendant's application to have the writ set aside on the aforesaid ground.

Application for stay of proceedings

The second prayer of the appellant is for an order that all proceedings herein be stayed pursuant to s 6 of the Arbitration Act 1952 ('the Act'). The appellant relies on cl 16 of the agreement (exh C5) in support of this application, which provides that:

> All disputes and questions whatsoever which may arise between the landowners and the developer touching this agreement or the construction or

application thereof or any clause or thing herein contained or as to any way relating to the said land or the rights or any party under this agreement shall be referred to a single arbitration if the parties shall agree upon one otherwise to two arbitrations one to be appointed by each party to the difference in accordance with and subject to the provisions of Arbitration Act 1952 or any statutory modification, thereof for the time being in force.

Whereas s 6 of the Act provides that:

> Power to stay proceedings where there is submission to arbitration
>
> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The approach to be adopted in considering an application of this nature is well settled. In *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459, Peh Swee Chin J (as then was) at p 460 summarised the principles to be adopted in the following words:

> It would be necessary to restate a few relevant basic principles of stay of action on ground of arbitration. Not only should there be a valid arbitration agreement, the applicant should apply for a stay before taking any step in the proceedings after appearance, and that applicant must satisfy the court that he was, at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration (see s 6 of the Arbitration Act 1952). These few principles require elaboration later in regard to the negative requirement of not taking any other step in the proceedings after appearance.
>
> In the face of such an application from a defendant, the plaintiff will have the onus of showing that the matter ought not to be referred to arbitration. Please see the old case of *Drouth v the Ship, 'Paul Donmer'* [1934] MLJ 72, and if the plaintiff fails to discharge that onus, the court will assume there is no sufficient ground for not granting a stay. In exercising its discretion, it is the prima facie duty of the court to act upon such an arbitration agreement: per Lord Selbourne LC in *Willesford v Watson* (1873) 8 Ch App 473.

On the question of the willingness of the defendant to submit to arbitration the learned judge had this to say (at p 461H–I):

> It was fourthly submitted that a bold assertion about willingness to do everything necessary for the proper conduct of the arbitration is not sufficient. Jessal MR in *Piercy v Young* (1880) 14 Ch D 200 made an observation, though obiter, that the lower court should have required an affidavit to be produced on the willingness or readiness to refer to arbitration. In my view, an affidavit ought to be ordinarily sufficient as to such willingness or readiness on the part of the defendant to refer to such a tribunal of its choice.

In *AR Fernandez & Ors v National Union of Bank Employees* [1986] 2 MLJ 135, the Supreme Court held, inter alia, that the respondent Union in that case had not complied with s 6 of the Act, in that it has not stated in its affidavit that it was ready and willing to do all things necessary for the proper conduct of arbitration. The learned judge, they said, should not therefore have made an order for reference to arbitration. Similarly, in our case the first defendant failed to state in his affidavit supporting this application (encl 79) that he is willing and ready to do all things necessary for the purpose of the arbitration. I am of the view that such a failure is fatal to the first defendant's application. I therefore dismiss the first defendant's application for a stay of the proceedings herein pending reference to arbitration.

For the above reasons the first defendant's application is dismissed with costs to be taxed unless otherwise agreed between the parties.

Application to set aside the writ and the first defendant's application to stay the proceedings dismissed with costs to be taxed.

Reported by Chew Phye Ken